MAY
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No. 837

In the

Supreme Court of the United States

OCTOBER TERM 1960

HERRIN TRANSPORTATION COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
SOUTHERN-PLAZA EXPRESS, INC.,
and
STRICKLAND TRANSPORTATION CO., INC.,
Appellees.

On Appeal from the United States District Court for the Southern District of Texas

BRIEF OPPOSING MOTIONS TO AFFIRM AND OR DISMISS

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Dated: May 1, 1961

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Cases:

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Miscellaneous

Supreme Court Practice, Second Revised Rules (1954), p. 288 — 2

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Pursuant to Rule 16, paragraph 3 of the Revised Rules of this Court, appellant files this brief in opposition to the Motion to Affirm filed by appellees United States of America and Interstate Commerce Commission and the Motion to Affirm or Dismiss filed by appellee Strickland Transportation Co.

STATEMENT

Appellant's Jurisdictional Statement heretofore filed herein presents the issues involved, and no reply to the motions of appellees as to the questions presented is deemed necessary.

Appellee Strickland does, however, move to dismiss the appeal as not timely filed and, while appellees United States of America and Interstate Commerce Commission make no point in this connection, mention is made of the dates of the filing of the opinion of the Court below, the entry of the judgment, and the filing of notice of appeal.

The opinion of the Court below was filed August 1, 1960, the cause having been heard on September 22, 1959. On September 20, 1960, the Clerk by letter addressed to the Commission Counsel, copy to all counsel, advised that "it is the practice in this District for a final judgment to be entered pursuant to the Court's opinion, and the time in which appeal may be effected begins the date the judgment is filed with the Clerk."

Final judgment, after approval as to form by all counsel, was filed November 28, 1960 (Appendix B to appellant's Jurisdictional Statement) and Notice of Appeal was filed January 20 ,1961.

ARGUMENT

The appeal was, it is clear, timely taken.

In *Supreme Court Practice, Second Edition, Revised Rules* (1954), (Robert L. Stern and Eugene Gressman), at p. 288, the applicable rule is stated as follows:

> "Whether the judgment or order below from which the time is computed is a docket entry by the clerk or a

formal order signed by the judge varies with the local practice. *United States v. Hark*, 320 U. S. 531, 534 * * *; see also *Puget Sound P. L. Co. v. King County*, 264 U. S. 22, 23-24 (date of judgment, not opinion, decisive)."

Indeed, the Motion to Affirm filed by counsel for United States and the Commission recognizes the rule as just stated. As this Court stated in *United States v. Shaffer Brewing Co., 356 U. S. 227, at 235*,

> " 'Where, as here, a formal judgment is signed by the judge, this is prima facie the decision or judgment rather than a statement in an opinion or a docket entry * * *. The judge was conscious, as we are, that he was without power to extend the time for appeal. He entered a formal order of record. We are unwilling to assume that he deemed this an empty form or that he acted from a purpose indirectly to extend the appeal time, which he could not do overtly. In the absence of anything of record to lead to a contrary conclusion, we take the formal order of March 31 as in fact and in law the pronouncement of the court's judgment and as fixing the date from which the time for appeal ran.' *United States v. Hark*, 320 U. S. at 534, 535."

The foregoing statement of this Court is controlling here, we submit, and permits of no conclusion but that this appeal was timely taken, in accordance with practice prevailing in the Court below.

The identical situation was present in *Interstate Commerce Commission, Appellant v. Frozen Food Express, et al., Appellee, 355 U. S. 6*, where the opinion of the Three Judge Court in the same Southern District of Texas, Houston Division, from which this appeal is taken, was filed December 31, 1956, final judgment was entered March 14, 1957,

and notice of appeal was filed by the Interstate Commerce Commission May 13, 1957. There the Commission relied upon the local practice of the Southern District of Texas, Houston Division, and the cases relied upon by appellant here, else its appeal would not have been timely.

We submit that the appeal here was timely taken, in accordance with the local practice and applicable decisions of this Court.

CONCLUSION

For the reasons stated, we believe that the appeal was timely taken, and the Motion to Dismiss on that ground should be overruled, and, for the reasons stated in appellant's Jurisdictional Statement, that the Motions to Affirm should be denied.

Respectfully submitted,

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By _____
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Herrin Transportation Company.

CERTIFICATE OF SERVICE

I, Carl L. Phinney, Attorney, for the Appellant Herrin Transportation Company herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served a copy of the foregoing Statement of Jurisdiction on the several parties to this action, as follows:

1. On plaintiff, T.S.C. Motor Freight Lines, Inc., by mailing copies in duly addressed envelopes, with first class postage prepaid, to its attorneys of record, to-wit: Mr. Reagan Sayers, Century Life Building, Fort Worth, Texas, and Mr. Jack Binion, Butler, Binion, Rice and Cook, Gulf Building, Houston, Texas.

2. On Intervening Plaintiffs, Central Freight Lines, Inc. and East Texas Motor Freight Lines, Inc., by mailing copies, in duly addressed envelopes, with first class postage prepaid, to their attorneys of record, to-wit: Mr. Phillip Robinson, Smith, Robinson and Starnes, 401 Perry Brooks Building, Austin, Texas, and Mr. A. J. Watkins, Baker, Botts, Andrews and Shepherd, 1600 Esperson Building, Houston, Texas.

3. On defendant United States, by mailing copies in duly addressed envelopes, with air mail postage prepaid to its attorneys of record, to-wit: Mr. Roger A. Clark, Department of Justice, Washington 25, D. C.; Mr. Robert A. Bicks, Acting Assistant Attorney General, Washington 25, D. C., and Mr. William D. Butler, United States Attorney, Southern District of Texas, 218 Main Post Office Building, Houston, Texas.

4. On defendant Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with air mail

postage prepaid to its attorneys of record, to-wit: Mr. Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., and Mr. James Y. Piper, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

5. On defendant Strickland Transportation Company by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its attorney of record, to-wit: Mr. Ewell H. Muse, Jr., 415 Perry Brooks Building, Austin, Texas, and W. N. Arnold, Jr., Fullbright, Crooker, Freeman, Bates and Jaworski, Bank of the Southwest Building, Houston 2, Texas.

6. On defendant Southern-Plaza Express, Inc., by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its attorneys of record, to-wit: Mr. Clarence D. Todd, Todd, Dillon and Singer, 1825 Jefferson Place, N. W., Washington 6, D. C.; Mr Dwight H. Austin, Liddell, Austin, Dawson and Huggins, Gulf Building, Houston 2, Texas, and Mr. Charles F. Riddle, Todd, Dillon and Singer, 1825 Jefferson Place, N. W., Washington 6, D. C.

DATED THIS THE 1st day of May, 1961

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